IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 TCK-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Third Party Plaintiffs,	)	
vs.	)	
CITY OF TAHLEQUAH, *et al.*,	)	
Third Party Defendants	)	

RESPONSE OF DEFENDANT PETERSON FARMS TO
STATE OF OKLAHOMA'S AUGUST 24, 2006 MOTION TO COMPEL
RESPONSES TO STATE'S MAY 30, 2006 REQUESTS FOR PRODUCTION

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RESPONSE OF DEFENDANT PETERSON FARMS TO
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RESPONSES TO STATE'S MAY 30, 2006 REQUESTS FOR PRODUCTION

Defendant Peterson Farms, Inc. ("Peterson") hereby submits its Response to the State of Oklahoma's Motion to Compel Peterson Farms, Inc. to Respond to Its May 30, 2006 Set of Requests for Production and Brief in Support (Dkt. #897) ("Motion to Compel"), and states as follows: [1]

I. INTRODUCTION

The nature of this discovery dispute can be summarized very simply – the State propounded discovery requests to several of the Defendants who were also defendants in the *City of Tulsa v. Tyson Foods, Inc.* case, No. 01-CV-0900EA(C) (hereinafter the "Tulsa lawsuit"), requesting among other things, that Peterson produce—without any limitation whatsoever—"copies of all documents and materials made available for inspection and copying by you [Peterson] to the plaintiffs in the [Tulsa lawsuit]. *See* Responses of Defendant, Peterson Farms, Inc. to State of Oklahoma's May 30, 2006 Set of Requests for Production to Poultry Integrator Defendants, Request No. 1, attached to Motion to Compel as Exhibit "A". Peterson objected to these requests on multiple grounds, and in particular on the basis that the Tulsa lawsuit involved entirely distinct poultry operations in a separate watershed, involved terrain, hydrology, reservoirs, point sources, third-party operations, experts, alleged injuries and issues that were entirely different from those at issue in the State's lawsuit over the Illinois River Watershed, which rendered the State's requests impermissibly overly broad and burdensome.

[1] Peterson maintains and reasserts its prior objections to the State's requests for production to the extent that this Response does not directly address them, including objections to the extent the requests seek Peterson's confidential business information and trade secrets.

Furthermore, the State's wholesale request for documents produced in the Tulsa lawsuit was followed by five additional blanket requests for *all* privilege logs, *all* written discovery responses, *all* employee deposition transcripts, *all* expert deposition transcripts and *all* "documents and materials referring, relating or pertaining to the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit." *See* Motion to Compel, Exhibit "A" at Request Nos. 2-6. Finally, the State requests that Peterson produce all joint defense agreements pertaining to the instant lawsuit. *See* Motion to Compel, Exhibit "A" at Request No. 7. These requests, like the first, are overly broad, burdensome and/or seek materials protected from discovery.

When Peterson participated in the meet and confer session with the State's counsel regarding these issues, Peterson's counsel advised that, if the State would make some *reasonable* effort to define the topics and documents it believed were relevant to the instant lawsuit, Peterson would be willing to further respond in an attempt to accommodate a more reasonable scope of discovery. However, the State's counsel flatly refused to expend any effort to narrow its requests and demanded that Peterson immediately screen the mass of Tulsa documents, determine what is relevant, and produce them. [2] Peterson expressed its view that this response was improper under the Federal Rules of Civil Procedure, and this Motion to Compel followed.

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[2] In the meet and confer session, the State's counsel admitted that they had prepared a list of "issues" relating to the Tulsa lawsuit, which they claimed were guiding their discovery efforts. When the defense counsel asked to be provided with the list so that they could narrow the scope of the dispute, the State's counsel refused, and held fast to their broad requests.

The State's requests for production of *all* documents from another litigation without any apparent attempt to craft requests to reach documents with evidentiary value in the current lawsuit clearly amounts to a fishing expedition which is both inappropriate and prohibited under Federal Rule of Civil Procedure 26. Nevertheless, the State purportedly justifies its overly broad and deficient discovery by contending that its objective was "to save *all the parties* involved time and money." *See* Motion to Compel (Dkt. #897) at 2 (emphasis added). *This claim is untenable*.

The State's May 30, 2006 requests for production far exceed the scope of relevancy of any claim or defense at issue in this lawsuit. Furthermore, the State has not, as otherwise required by Rule 26, demonstrated that its overly broad and burdensome requests are supported by the good cause contemplated under Rule 26 to gain access to the otherwise irrelevant, undiscoverable documents requested through its May 30, 2006 discovery. Finally, the mass of documents swept up in these requests, for the most part, exist in only hard copy form and fill numerous boxes; neither Peterson nor its counsel has physically located *all* the documents potentially responsive to the State's requests; and much of the Tulsa lawsuit production would have to be recreated if it were to be produced to the State. *See* Affidavit of Elizabeth A. Trotta at ¶¶ 5-10, attached hereto as Exhibit "1".

Granted, there may be certain, superficial similarities between this lawsuit and the Tulsa lawsuit.[3] In fact, as noted above, Peterson expressed to the State's counsel that it

[3] It is interesting to note that the State sets forth a laundry list of purported similarities between the cases, but it fails to support any claim that the documents from the Tulsa lawsuit will actually be probative of any issue in the instant case. Using the State's loose logic, a party could freely probe into another party's prior litigation without

would be willing to work with them to narrow the requests to Tulsa documents that may have some arguable relevance to the issues in this case. Moreover, Peterson has previously produced documents to the State (Bates Numbers PFIRWC 005684-005731) which originated in the Tulsa lawsuit and which are relevant to Peterson's defenses in this action.[4] Yet, the State's refusal to expend any effort or to reach any compromise on these discovery issues has left the parties at an impasse. Had the State taken the appropriate level of care and given a sufficient level of consideration to the specific topics and documents it could reasonably claim to be relevant to the instant action, rather than simply propound these broadly sweeping requests, the Court's involvement in this discovery dispute would likely have been unnecessary.[5] Instead, without exception, the State requested *all* documents from the Tulsa lawsuit without any limitation, justification or showing of relevance. The State's Motion to Compel should, therefore, be denied.

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making any showing of actual relevance to the matter at hand by simply alleging that the nature of the lawsuits were similar. Rule 26 requires more.

[4] In the spirit of compromise, and despite the State's recalcitrance to narrow its requests, Peterson is also willing to produce its employee and Rule 30(b)(6) depositions (subject to the entry of a protective order to cover confidential exhibits), which relate to poultry production and the operations of Peterson generally. However, Peterson maintains that the depositions from the Tulsa lawsuit relating to its poultry processing plant operations and waste water issues are completely irrelevant to the instant case as Peterson's processing plant in Decatur, Arkansas does not and cannot exert any influence on the Illinois River Watershed.

[5] For instance, in the State's July 10, 2006 set of discovery requests, the State propounded 125 specific and directed requests for production on Peterson, seeking information and materials related to its claims in this lawsuit. Despite Peterson's objections to the July 10 discovery, the State has demonstrated its ability to craft detailed discovery to obtain the types of information it seeks, thereby controverting its position that Peterson is putatively responsible for identifying evidentiary materials relevant to the State's claims.

II. ARGUMENT AND AUTHORITY

A. The State is not entitled to conduct a fishing expedition into prior litigation involving the *City of Tulsa* case

Under Rule 26, the State must demonstrate that the materials requested from the Tulsa lawsuit, as well as any current joint defense agreement, have some evidentiary value in this lawsuit. The blanket requests that are the subject of its Motion to Compel do not pass muster under this standard. The State cannot reasonably contend that every document, every grower file, every expert's file, every privilege log or every deposition transcript referring, relating or pertaining to the Tulsa lawsuit and the joint defense agreements in this action are relevant or will lead to the discovery of admissible evidence in this action. Accordingly, the State's Motion to Compel should be denied with regard to the overly broad, burdensome and irrelevant Requests for Production Nos. 1 through 7, and they should be directed by the Court to revise their requests to include a more appropriate scope, which would enable Peterson to respond.

By failing to articulate any definable scope of discovery other than simple blanket requests, the State's requests constitute an unapologetic fishing expedition and an improper harassment of Peterson. Courts have recognized that '[t]he legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow *fishing expeditions* in discovery.'" *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, at *2 (N.D. Ill. 1998)) (emphasis added). Similarly, it has long been the rule that discovery cannot be used "merely to vex or harass litigants." *Keenan v. Texas Production Co.*, 84 F.2d 826, 828 (10th Cir. 1936). "Neither can it be utilized for . . . impertinent intrusion." *Id.* Furthermore, when a litigant engages or

attempts to engage such otherwise inappropriate discovery conduct, the trial court has the discretion and authority to disallow the overreaching and harassing conduct. *See Martinez,* 229 F.R.D. at 218 (noting 'the district court . . . is not "required to permit plaintiff to engage in a 'fishing expedition' in the hope of supporting his claim.'" (quoting *McGee v. Hayes*, 43 Fed.Appx. 214, 217 (10th Cir. 2002)).

Peterson reminds the Court that it does not dispute that there may be some relevant and discoverable documents contained within the tens of thousands of pages swept up in the State's requests. Yet, the impermissible burden of these requests stems from their complete lack of limitation, encompassing a significant volume of documents and information that are in no way relevant to any claim or defense in this lawsuit. Indeed, the State has effectively conceded that the scope of its discovery from the Tulsa lawsuit is overly broad. As such, the State's requested discovery constitutes an impermissible endeavor to compel an opposing party to produce a mass of documents from previous litigation involving different operations in a different watershed based on its unbridled speculation and whim that there may be a few documents of interest discovered among the mass of irrelevant documents. *See* Exhibit "1" at ¶¶ 5-10.

1. The State's Requests for Production are overly broad, burdensome, and include a mass of irrelevant documents

The State's unlimited requests for production are overly broad and burdensome. For instance, in the case of *Audiotext Communications v. U.S. Telecom, Inc.*, 1995 WL 18759 *1 (D. Kan. 1995), the trial court denied the plaintiff's motion to compel discovery to the extent that they exceeded relevant issues in the litigation. With regard to the over-breadth and burdensomeness of the discovery requests, the court stated as follows:

> Requests should be reasonably specific, allowing the respondent to readily identify what is wanted. Requests which are worded too broadly or are too all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not. *They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request.* The court does not find that reasonable discovery contemplates that kind of wasteful effort. In this instance the court finds that most of these requests fail the test.

Id. at *1 (emphasis added). In other words, contrary to the State's contention, the responding party does not bear the burden of providing the specificity and relevance otherwise absent from the requesting party's discovery. *Id*.

Nevertheless, with regard to the instant discovery dispute, the State has taken the unsupportable position that Peterson should undertake just such an exercise in reviewing the document production from the Tulsa lawsuit. The total discovery materials from the *City of Tulsa* case sought by the State's overly broad requests amounts to tens of thousands of documents available only in paper form. *See* Exhibit "1" at ¶¶ 5-10. A mere sampling of the completely irrelevant topics covered by the State's requests, inclusive of Peterson and the other Defendants in the Tulsa lawsuit, include:

- Nutrient Management Plans for hundreds of Eucha/Spavinaw ("E/S") poultry growers;
- Contract and addenda for hundreds of E/S poultry growers;
- Flock settlement print outs for hundreds of E/S poultry growers;
- Vaccination and mortality records for hundreds of E/S poultry growers;
- Poultry house time and temperature records for hundreds of E/S poultry growers;
- Propane purchase records for hundreds of E/S poultry growers;
- Flock inspection reports for hundreds of E/S poultry growers;

- Grower files for hundreds of E/S poultry growers;

- Depositions of dozens of E/S poultry growers;

- Policies and procedures for the operation of Peterson's processing plant, including records of the operation of Peterson's wastewater pre-treatment facility;

- Communications between Peterson and the City of Decatur, Arkansas relating to wastewater treatment;

- Expansive logs of privileged and confidential documents responsive to Tulsa's discovery requests;[6]

- Reports, depositions and files of at least five experts covering irrelevant topics such as, Peterson's wastewater treatment and its "purported" effect of Spavinaw Creek; the operations of Tulsa's Wastewater treatment lagoons at lake Eucha; Tulsa's management of Lake Eucha and Spavinaw; Tulsa's potable water treatment technologies, plants; water quality of streams, groundwater and reservoirs in E/S Watershed; impacts of third-parties identified in the E/S Watershed; criticisms of the Plaintiffs' experts' principles and methodologies; modeling of hydrology and reservoirs in the E/S Watershed; Analysis of Tulsa's claimed taste and odor complaints; maintenance of Tulsa's water distribution system;[7] and

- Documents pulled from Tulsa's files relating to the watershed, the lagoons, taste and odor, and water treatment.

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[6] The question of the State's request for privilege logs is interesting. If Peterson is required to produce any of the Tulsa lawsuit documents in this case, and that production includes any privileged or confidential documents, those documents will have to be logged in this case. The claims of privilege in a prior case are inextricably intertwined with the production of those underlying documents. If the scope of the production is narrowed by virtue of the Court's Order on the instant Motion, it would be improper to require Peterson to disclose, by virtue of producing its prior logs, the existence of other non-responsive documents, and thus as a stand alone request, the State's pursuit of the Tulsa privilege logs should be denied.

[7] The work product of these experts has no relevance to the Illinois River Watershed, and since Peterson has not designated any of the same experts to testify for it in this case, these reports and materials cannot be used as impeachment material. Should Peterson designate any of the experts used in the Tulsa lawsuit, Plaintiffs can re-issue requests related to their prior work.

See Exhibit "1" at ¶ 5. The overwhelming amount of irrelevant, or at best, marginally relevant documents and materials swept up in the State's requests render them clearly overly broad and unduly burdensome.[8] Accordingly, the State cannot reasonably contend that its overly broad and burdensome requests for production are "simply an effort to save *all the parties* involved time and money." *See* Motion to Compel (Dkt. #897) at 2 (emphasis added). Thus, were the State's Motion to Compel were granted, Peterson would be subjected to the same abusive and wasteful discovery prohibited by the *Audiotext* court.

The State nonetheless advances the unsupportable claim that Peterson's assertion of overbreadth and burdensomeness is too conclusory and unsupported by specific facts. The irony of the State's argument, as discussed above, is its own requests for production fail to supply the requisite specificity regarding the materials it seeks from the *City of Tulsa* lawsuit. Despite the insufficiency of its discovery requests, the State's argument nevertheless fails, as Peterson objected to the State's discovery requests in detail as stated in its responses to the State's May 30, 2006 requests for production and continues to object in this Response.[9] Additionally, Peterson's objections to the overbreadth of the

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[8] In addition, at present, the whereabouts of *all* these documents, which exist only in paper form, is unknown. Exhibit "1" at ¶ 10. Consequently, many of the document sets would have to be recreated before they could be produced to the State in this lawsuit. Exhibit "1" at ¶ 6.

[9] In part, Peterson's objection reads as follows: "Peterson objects to this request as it is overly broad and burdensome. This request seeks documents related to another litigated case that involved another distinct watershed, entirely different operations, and which included within its scope Peterson Farms' poultry processing plant, which is not at issue in the present case. . . . Finally, Peterson objects to this request as it includes within its scope documents that contain confidential business information and trade secrets. The request fails to set forth a sufficiently defined scope of discovery or to adequately identify the type or nature of documents sought so as to reach any specific documents, which

State's discovery requests includes Peterson's objections regarding the relevant statutory periods intended to define the reasonable scope of discovery.[10] In any event, Peterson has fulfilled its obligations to show specific facts that establish the overly broad and burdensome nature of the State's requested discovery.

2. Based upon the facial overbreadth of the State's Requests pertaining to the Tulsa lawsuit, it has failed to meet its burden to show relevance

As set forth in the prior section, the State's discovery requests encompass a large number of irrelevant documents and materials that are not discoverable in this case. Federal Rule of Civil Procedure 26 controls the scope of discovery and provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). Under this standard, courts have held that "a request for discovery should be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party." *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D. Kan. 2004). In other words, the discovery request must seek materials relevant to the issues in the case. "'[T]he object of inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue.'" *Martinez v. Cornell Corrections of Texas*,

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constitutes a mere fishing expedition." *See* Motion to Compel, Exhibit "A" at Request Nos. 1-6.

[10] The State's requested discovery and the scope of reasonable burden should be limited to the longest period of limitations under the claims asserted, *i.e.*, its CERCLA claims. CERCLA § 112(d), 42 U.S.C. § 9612(d). Despite the State's contention that it is unencumbered by any statute of limitations, several federal courts have specifically recognized the applicability of the CERCLA statute of limitations as states' claims. *See State of Colo. v. ASARCO, Inc.*, 616 F.Supp. 822 (D. Colo. 1985); *State of Idaho v. Bunker Hill Co.*, 634 F.Supp. 800 (D.Idaho 1986); *State of N.Y. v. General Elec. Co.*, 592 F.Supp. 291 (N.D.N.Y. 1984). Accordingly, to the extent that the State seeks materials prior to limitations period, the request is overly broad.

229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, at *2 (N.D. Ill. 1998).

The State has failed to meet its burden to establish relevance in either its discovery requests or its instant Motion to Compel. "[W]hen the request is overly broad on its face or when relevancy is not readily apparent, the party seeking the discovery has the burden to show the relevancy of the request." *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D. Kan. 2004). Here, the State's requests are both overly broad on their face, and it is not readily apparent how *all* or even a substantial portion of the documents requested are relevant to the issues in this lawsuit. Rather, the State places undue reliance on a single products liability case to claim that all discovery in the Tulsa lawsuit is somehow relevant to its own. *Snowden v. Connaught Labs.*, Inc., 137 F.R.D. 325 (D. Kan. 1991). However, as discussed below, the issues in this lawsuit are significantly different from those in the *Snowden* case. For example, unlike *Snowden*, this case is not a products liability case where the requested discovery of the prior litigation involves uniform subject matter—a single, identical product. To the contrary, the subject matter of this lawsuit involves allegations of contamination attributed to a multitude of factors that are unique to the distinct geographic regions subject to the lawsuit and the State's discovery requests.

Moreover, the *Snowden* case applies a prior version of Federal Rule of Civil Procedure 26, containing a different standard from that in the current Rule 26. *Snowden v. Connaught Labs.*, Inc., 137 F.R.D. 325 (D. Kan. 1991). The current scope of relevant discovery under Rule 26 is limited to that which is "relevant to a claim or defense." Fed. R. Civ. P. 26(b)(1). The *Snowden* version of Rule 26—urged by the State—allowed

discovery "if there is any possibility that the information sought may be relevant to the subject matter of the action." *Snowden*, at 329. Notably, since the amendments to Rule 26, courts have departed from the Rule 26 discussed in *Snowden*, narrowing the relevant discovery scope "from 'subject matter' of the action to 'claim or defense or defense of any party.'" *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 31235717 *2 (S.D.N.Y. 2002) (citing Fed. R. Civ. P. 26(b)(1) advisory committee's note to the 2000 amendment); *see also Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (stating that the 2000 amendment was made with the intent "that the parties and the court focus on the actual claims and defenses involved in the action").

Of note, the *Johnson Matthey* court ultimately denied a motion to compel similar to the State's Motion to Compel, seeking discovery of documents related to prior litigation, because the request concerned matters which were "in no way relevant to a claim or defense at issue." *Id.* Like that case, the State's instant requests for production encompass documents and materials from prior litigation that are irrelevant to claims or defenses in *this lawsuit*. *See* Exhibit "1" at ¶¶ 5-6, 9. Accordingly, the State cannot possibly demonstrate that all of the documents sought through its requests for production are within the scope of relevant discovery permitted under the current version of Rule 26.

Rather, in the instant case, the State ignores the relevancy issue and its burden thereunder by asserting that *all* documents and materials requested from the *City of Tulsa* case are somehow relevant to this lawsuit despite its admission that "the instant case and the *City of Tulsa* case are not completely identical." *See* Motion to Compel (Dkt. #897) at 5. Given the expansive nature of the documents contained within the scope of the State's requests, it would constitute a departure from logic if Peterson were compelled to

produce documents and materials encompassing *all* issues of the *City of Tulsa* case, when—by the State's concession—only *a fraction* of the information sought potentially applies to the issues in this lawsuit. Despite its contentions otherwise, the State has the burden to propound discovery that reasonably defines the scope of documents sought. Peterson has no obligation to sift the mass of documents from the *City of Tulsa* case to make the State's decisions about what might possibly be relevant within the vastness of these overly broad requests. *Audiotext Communications v. U.S. Telecom, Inc.*, 1995 WL 18759 *1 (D. Kan. 1995).

The State also ignores and denies the most significant distinctions between the Tulsa lawsuit and this action. While both cases involve environmental claims of impact from the land application of poultry litter to water resources, the setting for the lawsuits are distinct, encompassing two separate and geographically distinct watersheds. By definition, the activities in one watershed cannot and do not affect the water in another watershed. Furthermore, the alleged environmental impacts in the Illinois River Watershed could only derive from conduct on lands within its boundaries. Thus, in order to demonstrate relevance, the State must explain how the ownership, operations, and finances of poultry growers in the Eucha Spavinaw Watershed could possibly have any probative value in the State's instant case. The State's discovery requests and the corresponding Motion to Compel fail in this respect, as the State cannot possibly demonstrate the requisite relevance.

The same is true for Peterson's processing plant and wastewater discharges. How can the State argue that it needs information regarding how Tulsa managed its reservoirs, water treatment plants, lagoons and distribution system, including the experts'

evaluations of these issues to advance its case against the Defendants? It cannot. How can the defense experts' evaluations of the principles and methodologies employed by Tulsa's experts be used in the instant case? They cannot. The distinctions between the two cases make it clear that the scope of State's requests for production include documents and materials having neither evidentiary value nor any bearing on any claim or defense in this lawsuit. Thus, the State's Motion to Compel should be summarily denied because the requests are so broadly drafted that irrelevant documents and materials will make up the vast bulk of the documents sought.

B. The State is not entitled to discover the confidential documents reflecting the implementation of the *City of Tulsa* settlement

In its Request No. 6, the State seeks the production of documents relating to "the implementation of and compliance with the terms of the consent order entered in the [Tulsa lawsuit]." Once again, the State seeks documents that are neither relevant to the issues in its lawsuit against the Defendants, nor will this information lead to the discovery of admissible evidence.

The Settlement Order in the Tulsa lawsuit establishes certain activities that must take place during the four-year post-settlement period and dictates those items the participating defendants are required to fund. Case No. 01-CV-0900 EA(C), Dkt. #473. The Order also sets forth what elements of the post-settlement activities are to be made public in reports to the Court through the Special Master and Watershed Management Team. Case No. 01-CV-0900 EA(C), Docket No. 473 at Ex. 1, Para. D(6), E(5), E(7). Accordingly, Peterson objected to this request and directed the Plaintiffs to the Court's Special Master, John Everett, J.D., P.E. to obtain those materials.

Despite the arguments advanced in its Motion for production of the "operational" documents from the Tulsa lawsuit, the State offered no justification for invading the Defendants confidential records to probe into the costs of the Tulsa settlement implementation funded by the participants beyond what Judge Eagan deemed necessary to disclose. The confidential elements of the Tulsa settlement and how the elements are being accomplished have no bearing on any claim of liability or defense in the instant lawsuit. The very notion that the State can invade these financial details, which Peterson likewise deems to be confidential, undermines the incentive any party would have for settling such a claim. Even the settling party, the City of Tulsa, has no right to discover this information, as all that is relevant in that case is whether the Order is being complied with and the specific reports the Court has required of the Special Master. The State has made no showing with regard to this material, and therefore, Peterson requests that the State's Motion with regard to Request No. 6 be denied.

C. The Joint Defense Agreements requested by the State are not discoverable in this lawsuit

Finally, in addition to the overbroad and burdensome discovery requests discussed above, the State has also requested that Peterson produce copies of any joint defense agreement executed in conjunction with this lawsuit. The State contends that it requires these joint defense agreements in order that it might "evaluate Peterson's privilege claims in this litigation." *See* Motion to Compel (Dkt. #897) at 10. Notably, this is the State's only justification for requesting documents which are privileged and otherwise irrelevant to any claim asserted by the State in this action. Consequently, the State has failed to show that any joint defense agreement falls within the purview of a discoverable document under the current version of Rule 26.

In this regard, the joint defense agreements to which Peterson is a party in this lawsuit are protected by the common interest privilege in conjunction with the attorney work product doctrine. *See McNally Tunneling Corp. v. City of Evanston*, 2001 WL 1246630, at *2 (N.D. Ill. 2001).[11] The rationale for common interest protection is that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 387 (M.D. N.C. 2003). The *McNally* court held that the joint defense agreement in that case was protected as work product to the extent that, if disclosed, it would reveal mental impressions and thought processes of attorneys for the defendants sharing a common interest. *McNally*, 2001 WL 1246630, at *4. The joint defense agreement in the *McNally* case described the co-defendant's joint defense strategy. *Id.* at *3. That court further reasoned that the joint defense agreement was protected because it had been clearly prepared in anticipation of litigation and the document would reveal the mental processes of the party's attorney regarding the possible defense to the litigation. *Id.* at *4.

Notably, the State has failed to establish the requisite proof required by Federal Rule of Civil Procedure 26(b)(3) to discover documents otherwise protected by the work

[11] Peterson's joint defense agreements are also protected from discovery by the common interest doctrine in conjunction with the attorney/client privilege. *McNally*, 2001 WL 1246630 at *4. The *McNally* court found that a joint defense agreement can be protected by attorney/client privilege where "(1) legal advice of any kind is sought, (2) from a professional legal advisor in her capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor (8) except the protection be waived." *McNally*, 2001 WL 1246630 at *4 (applying Illinois law). Peterson's joint defense agreements meet these elements, and notwithstanding the fact that the State fails to cite authority to the contrary, they are therefore protected by the combination of the common interest doctrine and attorney/client privilege.

product doctrine. The work product doctrine provides a qualified privilege that may be overcome if the party seeking discovery establishes either a "substantial need" or "undue hardship" argument that justifies disclosing the protected document or thing. *Id.* at *4 (discussing Fed. R. Civ. P. 26(b)(3)). The State has failed to show a substantial need or undue hardship to justify the need for obtaining Peterson's joint defense agreements despite work product protection.

The State only alleges "[s]uch agreements are relevant inasmuch, to the extent there are any, they are necessary for the State to evaluate Peterson's privilege claims in this litigation." *See* Motion to Compel (Dkt. #897) at 10. However, the existence of any privilege is a matter of law exclusively within the Court's domain to evaluate and determine. *See, e.g., Dick v. Truck Ins. Exch.*, 386 F.2d 145, 147 n.2 (10th Cir. 1967); *SCO Group, Inc. v. Novell, Inc.*, 377 F. Supp. 2d 1145, 1152 (D. Utah 2005). Furthermore, a written agreement is not necessary for a party or parties to maintain a joint defense arrangement or to assert a claim of joint defense privilege. *United States v. Stepney*, 246 F. Supp. 2d 1069, 1080 n.5 (N.D. Cal. 2003). The existence of a written agreement merely assists *the trial court* in assessing whether a particular communication was made pursuant to a joint defense effort. *Id.*

In the instant case, like the *McNally* case, Peterson's joint defense agreements were prepared in anticipation of litigation and contain information that, if disclosed, would reveal the joint defense attorneys' mental impressions and thought processes, such as litigation strategy. These agreements go beyond the parties' recognition that they share common interests in defending against the State's claims, setting forth the relationship among the parties and their obligations to one another. Therefore, the joint

defense agreements requested by the State in this lawsuit are protected by the common interest doctrine in combination with the attorney work product doctrine. The State's proposition that these agreements are needed for its evaluation of privilege falls well short of establishing "substantial need" or "undue hardship" necessary to satisfy Rule 26(b)(3) to obtain the joint defense agreement over work product protection. Consequently, its Motion to Compel production of the joint settlement agreements should be denied.

III. CONCLUSION

For all of the above reasons, Defendant, Peterson Farms, Inc. respectfully requests the Court deny the State of Oklahoma's Motion to Compel Peterson Farms, Inc. to Respond to Its May 30, 2006 Set of Requests for Production and Brief in Support (Dkt. #897) and order the State to amend their May 30, 2006 requests for production to ask for specific documents and materials from the Tulsa lawsuit that are relevant only to a claim or defense in this lawsuit.

Respectfully submitted,

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